No. 83-1493

In The
Supreme Court of the United States
October Term, 1983

GENERAL HOSPITALS OF HUMANA, INC.,
Petitioner,

vs.

ARKANSAS STATEWIDE HEALTH COORDINATING COUNCIL, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

RESPONDENT STATEWIDE HEALTH COORDINATING COUNCIL'S BRIEF IN OPPOSITION

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INTRODUCTION

Identification of Interest

This Respondent, the Statewide Health Coordinating Council (SHCC), an agency of the State of Arkansas, submits its brief solely in the public interest. The SHCC is a thirty-six member board comprised of health care experts, including both health care providers and health care

consumers, all of whom are appointed by the Governor to represent various interest groups.

The cost of health care is of vital concern to the general public. Experience has proven that competition does not bring down hospital costs. Excess hospital beds are empty beds, and "an empty bed costs about half as much to maintain as an occupied bed." (Arkansas Supreme Court Opinion, Humana Appendix 1a). Patients in *all* hospitals pay for these empty beds. That is why health planning became the subject of legislation several years ago. The Arkansas General Assembly chose to join in the effort and created its own program to control the cost of health care in Arkansas. The decision below is evidence of the progress Arkansas has made.

Legislative Background

In 1964 Congress enacted the Hospital and Medical Facilities Amendments of 1964, Pub. L. No. 88-443 (codified at 42 U.S.C. §243, *et seq.*) which provided over one billion dollars in grants per year for four years for the construction and modernization of hospitals and other medical facilities. Congress decided that it should increase its efforts to allocate health care facilities to those areas most in need. As a result, an emphasis was placed on areawide planning to insure "against the use of public and private resources to construct facilities which are not needed or are poorly located." Sen. Rep. No. 1274, 88th Cong., 1st Sess.; [1964] U.S. Code Cong. & Ad. News 2802.

To accomplish that purpose, Congress provided that any state that wanted to participate in the grant program would be required to conduct areawide planning, which

included the establishment of a "state advisory council." The council would establish the health care needs for the state by surveying the need for new facilities and by developing a plan for distribution of such facilities throughout the state. Pub. L. No. 88-443, §604(a) (4). The plan would then be carried out by a state agency which would work in consultation with its advisory council. Pub. L. No. 88-443, §604(a) (3).

The federal law was further amended in 1966 to provide grants for state health planning efforts. Pub. L. No. 89-749. In 1969 the Arkansas Legislature established the "Comprehensive State Health Planning Agency" to administer the federal funds that had become available for health planning, and it established the State Health Planning Council to "advise the agency in carrying out the functions of the agency." 1969 Ark. Acts, Act 305, §3.

By 1974 it became apparent to Congress that the nation's health planning efforts were still not effectively controlling health care costs and that excessive hospital beds were the leading contributor to the rise. As a result, in 1974 a move was made to replace the existing regulatory program through the adoption of the National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641 (codified at 42 U.S.C. §201, *et seq.*). That law was the precursor to Arkansas' current health planning laws.

Pub. L. No. 93-641, as amended by Pub. L. No. 96-79, now provides approximately 100 million dollars annually in grants for state health planning. Participation in the program is optional, and at least two states (Louisiana and New Mexico) have chosen not to participate. Re-

ceipt of the federal health planning grant money is conditioned upon having an approved program, the parameters of which are provided in the federal laws and regulations. 42 U.S.C. §201, *et seq.*; 42 C.F.R. Part 123. For example, the states are required to form regional Health Systems Agencies ("HSA's," of which there are four in Arkansas). The Health Systems Agencies then develop regional health care priorities in an effort to prevent unnnecessary duplication of services and facilities within their respective geographical areas which was performed in this case by the Central Arkansas Health Systems Agency ("CAHSA"). The regional planning efforts are co-ordinated and consolidated into one comprehensive State Health Plan adopted by the SHCC. The State Health Plan is then enforced by requiring health care providers to obtain a Certificate of Need from the administrative state agency, the Arkansas Health Planning and Development Agency ("AHPDA") prior to commencing construction of "major new facilities." *Ark. Stat. Ann.* §82-2311 (1983 Supp.). A Certificate of Need may only be issued if the proposal is "in conformity" with the State Health Plan (*Ark. Stat. Ann.* §82-2307 (1983 Supp.)), or as stated in the state Certificate of Need Rules "consistent with the State Health Plan." AHPDA Rule 4(d).[1]

REASONS FOR DENYING THE WRIT

A. THE DECISION BELOW DOES NOT IMPOSE A MANDATORY FEDERAL STANDARD UPON STATE HEALTH PLANNING

[1]Policies, Procedures and Criteria For Certificate of Need Review, Capital Expenditure Review and New Institutional Health Services Review, March, 1981, referred to as "AHPDA Rules".

ACTIVITIES BECAUSE IT IS FOUNDED UPON INDEPENDENT AND ADEQUATE STATE GROUNDS.

Humana asserts that the issue presented on appeal is based upon federal law because the decision below refers to the four beds per 1,000 population standard (which Humana calls a "guideline") found in federal regulations. 42 C.F.R. §121.201(a) (1983). However, an analysis of the opinion does not support the claim. In both instances in which the Arkansas Supreme Court referred to the four beds per 1,000 population standard it provided *both* the federal regulation and the Arkansas State Health Plan reference to the standard. When the court held that the agency's decision had to be consistent with the State Health Plan, it gave a reference to the AHPDA Rules. Finally, when the court held that there was "no substantial evidence" that the application did not exceed the "state maximum of four beds per 1,000 persons" it relied upon Arkansas administrative procedure decisions. This court has no jurisdiction to review a decision such as the one below which is based upon non-federal grounds. *Herb v. Pitcairn*, 324 U.S. 117 (1945).

The Federal Laws Demonstrate That The Decision Below Could Not Have Been Made Upon Federal Law Grounds.

Since the Arkansas Supreme Court clearly relied upon duly adopted state laws and regulations, the only jurisdictional claim this court may assert is one based upon a coexistence of federal and non-federal grounds. Where the state court bases its decision upon state and federal grounds federal jurisdiction only attaches "when the lower court opinion as a whole leaves the impression that the [lower] court . . . felt under compulsion of federal law

as enunciated by [federal law] so to hold . . . with the result that the state and federal grounds are so interwoven that [the United States Supreme Court is] unable to conclude that the judgment rests upon an independent interpretation of the state law." *Jankovich v. Indiana Toll Road Comm.*, 379 U.S. 487 (1965); *State Tax Comm. v. Van Cott*, 306 U.S. 511 (1939); *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1 (1950).

The state standards upon which the lower court relied are part of a voluntary grant program, and the fact that the Department of Health and Human Services may terminate Arkansas' right to participate in the grant program has been held to be not coercive. *State of North Carolina v. Califano*, 445 F.Supp. 532 (E.D. N.C. 1977); *Goodin v. Oklahoma Welfare Comm.*, 436 F.Supp. 583 (W.D. Okla. 1977). Cf. *Oklahoma v. United States Civil Service Comm.*, 330 U.S. 127 (1947). Further, although the standard is based upon a similar federal regulation, there is no federal preemption or supremacy involved which could have created a feeling of compulsion by the Arkansas Supreme Court to rule as it did. *Village of Herkimer v. Axelrod*, 451 N.Y.S.2d 303 (1982); *Women's Community Health Center of Beaumont, Inc. v. Texas Health Facilities Commission*, 685 F.2d 974 (5th Cir. 1982). When the lower court's decision can be sustained on a state law ground, even when the state law ground was adopted to comply with a condition of a federal grant, the United States Supreme Court does not have jurisdiction to hear the appeal. *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487 (1965).

A Conflict Among State Courts Is Not A Ground For Granting Certiorari.

Humana argues that all other states have interpreted similar regulatory standards differently from the interpretation given by the Arkansas Supreme Court and that if the decision below is not reversed it will somehow re-write the federal legislation and/or the implementing legislation other states have adopted. The United States Supreme Court may neither re-write state statutes, nor re-interpret them for state courts. 27 U.S.C. §1257; *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940). If there are inconsistencies, they arise from the individuality of the laws and regulations the various states have adopted;[2] and the interpretations given by state regulatory bodies and in judicial review opinions which Congress established at the *state* level. 42 U.S.C. 300n-1(b) (12) (E). The interpretations given to numerical bed need formulas are more varied than the formulas themselves, and one cannot develop a "national trend" as Humana suggests. Two of the decisions cited by Humana[3] are state trial court decisions which should not be cited as the official position of a state on the issue. One of the decisions[4] dealt with compliance with a health systems plan. There is no require-

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[2]Humana admits in its brief at page 10 that only twelve out of 49 states have adopted the standard upon which the Arkansas Supreme Court relied.

[3]*Northwest Health Care, Inc. v. Idaho Health Facilities Review Board*, No. 76772 (Idaho District Court, Ada County, January 27, 1983); *West Virginia Health Systems Agency, Inc. v. State Health Planning and Development Agency*, CIV-NO. AP-CA-80-1 (W. Va. Cir. Ct., Kanawha County, July 2, 1980).

[4]*West Virginia Health Systems Agency, Inc. v. State Health Planning and Development Agency, supra.*

ment that a CON decision be consistent with a health systems plan, as is the case with the State Health Plan.[5] Three of the decisions[6] were rendered under state statutory structures that did not require Certificate of Need decisions to be consistent with the State Health Plan. Moreover, several opinions have sustained Certificate of Need decisions which were based upon numerical standards such as the four beds per 1,000 population standard.[7] With respect to the *National Geremedical Hospital v. Blue Cross*, 452 U.S. 378 (1981) decision, this court came closer in that opinion to supporting the decision below than contradicting it. In the portion of the footnote Humana failed to cite, this court stated that: "Where 'competition appropriately allocates supply *consistent with* health systems plans and *state health plans*, planning agencies should give priority . . . to actions which would strengthen

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[5]Compare 42 U.S.C. §300m-2(c) and AHPDA Rule 11(10) with 42 U.S.C. §300m-6(a) (5) and AHPDA Rule 4(d).

[6]*Fairfield Nursing Home v. Whalen*, 407 N.Y.S.2d 304 (App. Div. 1978); *Irvington General Hospital v. Department of Health*, 149 N.J. Super. 461, 374 A.2d 49, 51 (App. Div. 1977); *Sturman v. Ingraham*, 52 A.D.2d 882, 383 N.Y.S.2d 60, 64 (Sup. Ct. Div. 1976).

[7]*Tarpon Springs General Hospital v. Office of Community Medical Facilities*, 366 So.2d 185 (Fla. App. 1979)—Florida court relied upon the state health plan's numerical projection of bed need in denying a Certificate of Need; *In Re: Certificate of Need Application by the Bethany Medical Center*, 230 Kan. 201, 630 P.2d 1136 (Kan. 1981); and *In Re: Review of Decision of Kansas Corporation Commission*, 232 Kan. 787, 659 P.2d 199 1983);—Kansas court affirmed decision based upon numerical formula for determining need; *American International Health Services, Inc. v. Rhode Island Department of Health*, No. 77-3474 (R.I. Super. Ct., Prov. Cty., September 11, 1978), *cert. den.* 396 A.2d 945 (R.I. 1979)—state agency decision based upon an excess of hospital beds in the state affirmed.

the effect of competition.'" 452 U.S. at page 388 (emphasis added). In other words, this court, quoting from legislative history, recognized that consistency with a State Health Plan is the first criterion which must be adhered to, and if a proposal is first "consistent with . . . the state health plan" then priority should be given to projects which would strengthen competition. Similarly, the Arkansas Supreme Court, quoting from the AHPDA Rules, stated that all Certificate of Need decisions first "must be consistent wi.h the State Health Plan." AHPDA Rule 4(d).

B. THE DECISION BELOW DOES NOT DENY HUMANA DUE PROCESS BECAUSE IT ONLY REQUIRES THE AHPDA TO EXERCISE ITS DISCRETION WITHIN THE BOUNDS OF ADOPTED STANDARDS.

Although the due process issue raised in the second and third questions for review were discussed by Humana in its Petition for Rehearing filed below, the issue was neither considered nor passed upon by the Arkansas Supreme Court in its decision.[8] There is nothing in the record which is sufficient to create a federal question. For *certiorari* jurisdiction to attach, there must be an "attack upon the validity of the order, not merely upon the court's judgment." The opinion for which *certiorari* is requested must show that the court "considered or necessarily passed upon the question[s presented for review.] . . . [Petitions for Rehearing] form no part of the record and

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[8]The entire decision on rehearing, with the exception of a dissent, is "Petitions for Rehearing are denied." Humana Appendix 1b.

are not adequate to create a federal question when no such question was necessarily decided below." *Live Oak Water Users Association v. Railroad Commission,* 269 U.S. 354 (1926). The due process issues raised as Humana's second and third questions for review, which were not raised below except by Petition for Rehearing, and which were not discussed in the decision, are not proper federal questions for *certiorari* jurisdiction.

The Roles of the CAHSA And The SHCC Do Not Conflict With The Role Of The AHPDA.

The roles of the HSA and the SHCC as described in Federal legislation are to determine the health care needs within the state, and to identify those needs through the adoption of regional Health Systems Plans, and ultimately a comprehensive State Health Plan. The State Health Plan "describe[s] the . . . acute inpatient services . . . needed, the number and type of resources . . . required, . . . and the extent to which new health care facilities need to be constructed." 42 U.S.C. §300m-3(c). The only "action" taken by the CAHSA and the SHCC with which Humana can take exception is the adoption of those plans, because it is through the adoption of the State Health Plan that the four beds per 1,000 population standard became a criterion for Certificate of Need review in Arkansas. However, it cannot be argued that adoption of the State Health Plan is not properly the function of the SHCC. 42 U.S.C. §300m-3(c); *Ark. Stat. Ann.* §82-2309 (a). What Humana seeks therefore is a determination that the AHPDA has the discretion to issue a Certificate of Need which is not consistent with the State Health Plan, which would have the effect of sanctioning a viola-

tion of *Ark. Stat. Ann.* §83-2307 as well as AHPDA Rule 4(d). Perhaps the explanation provided by the SHCC in its Response to Humana's Petition for Rehearing can best distinguish the respective roles of the SHCC and the AHPDA:

> SHCC has no intention of infringing upon the discretionary role of the AHPDA in its future review and assessment of individual Certificate of Need applications, so long as the AHPDA's decisions are consistent with the State Health Plan. That is in keeping with the laws and the court's opinion, and we see nothing in the AHPDA's petition [for rehearing] which objects to that division of responsibility.

The Procedure For Adopting And Amending The State Health Plan Is Not Unconstitutional.

Humana's "Fourteenth Amendment" argument simply states that because the Central Arkansas Health Systems Agency ("CAHSA") and the SHCC include potential competitors within their memberships, and because the State Health Plan which they create and adopt must be followed in Arkansas Certificate of Need decisions, Humana is denied due process. Humana is essentially arguing first that due process entitles it to a decision that would violate AHPDA Rule 4(d), and second that due process demands that the AHPDA be authorized to amend the State Health Plan in an individual Certificate of Need decision. It would only be a denial of due process if the AHPDA failed to follow its rules, or if the State Health Plan were improperly amended. *United States ex rel. K.C.S. Ry. Co. v. Interstate Commerce Comm.*, 252 U.S. 178, 187 (1920); *Tracy v. Startwout*, 35 U.S (10 Pet.) 80 (1833). With respect to Humana's claim of bias by the Central Arkansas Health Systems Agency, in *Simon v. Cameron*, 337 F.

Supp. 1380 (C.D. Cal. 1970) a local health planning agency's authority to exercise the type of discretion Humana finds objectionable has been held constitutional:

> The voluntary planning agency with its close connections should be characterized as a public agency. The law contains sufficient standards to guide the agency in its function of assessing community need for health facilities and granting or withholding its approval accordingly. The delegation and licensing authority is thus clearly constitutional.
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> • • •
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> Application of the due process clause of the Fourteenth Amendment to invalidate the delegation of authority to local planning bodies would lead to the invalidation of numerous delegations of authority to private bodies which Congress and state legislatures have established and which are accepted generally.

C. HUMANA CHOSE NOT TO PRESENT EVIDENCE OF NEED UNDER THE FOUR BEDS PER 1,000 STANDARD DURING THE INITIAL HEARING, AND DUE PROCESS DOES NOT REQUIRE A REMAND.[9]

The standard endorsed by the Arkansas Supreme Court was neither unique nor unforeseen. The four beds per 1,000 standard has been part of every Arkansas State Health Plan ever adopted, including the one adopted in June of 1980 which was in effect during the review of the Humana application. The substantive effect of Arkansas' State Health Plan (*i.e.*, that Certificate of Need decisions must be consistent with it) was part of both the

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[9]For the reasons stated above at pages 9-10, this third question for review does not contain a properly presented federal question.

enabling legislation and the very rules which governed the administrative process. *Ark. Stat. Ann.* §82-2307 (Supp. 1983); AHPDA Rule 4(d). As stated in the decision below, an agency is bound to follow its own rules, and it is neither "unique" nor "unforeseen" when a court requires the agency to do so. Contrary to Humana's assertion, it was the approval of the Humana Certificate of Need which was a break with previous Arkansas practice. The record shows that the Humana Certificate of Need marked the first time during the seven year history of the agency, that a Certificate of Need had been approved that was not consistent with the State Health Plan. (R. 5232-33, 5235-37, 5240-42, 5249, 5253, 5262, 5266-67, 5271-74, 5278). The Arkansas Supreme Court merely corrected an aberration.

Humana had the same right to present evidence that its application complied with the four beds per 1,000 population standard as did the other parties. Humana chose not to do so, which left only the evidence presented by one of Humana's opponents and the CAHSA Health Systems Plan in the record on that issue. All of the evidence shows that Humana's proposal exceeded the four beds per 1,000 standard. Due process does not require that an applicant be given a second bite of the apple. *Holley v. Lawrence,* 317 U.S. 518 (1943). *Saunders v. Shaw,* 244 U.S. 317, 320 (1917) does not support Humana's request for the second bite. In *Saunders* the defendant proffered testimony over the plaintiff's sustained objection, and a judgment for the plaintiff was sustained on appeal. On rehearing the judgment was reversed, with judgment being entered for the defendant on the basis of the defend-

ant's proffered testimony. Justice Holmes, responding to the procedural issue of the timeliness of raising the constitutional issue, explained that *certiorari* jurisdiction attached because the petitioner was barred from raising the issue in state court by a procedural rule prohibiting a second rehearing petition. The petitioner in *Saunders* was entitled to a remand because he was not required to present the evidence below since he had been successful in keeping out his opponent's testimony through objection. In this case Humana's opponent presented substantial evidence on the four beds per 1,000 population standard, without objection. The Arkansas Supreme Court stated in its opinion that state law permits the standard "to be exceeded locally to meet exceptional conditions, . . . [but there were] no finding[s] that any such exceptional condition exists." Humana simply chose not to address the issue, and is not entitled to a remand to correct its own error. The same distinction of the *Saunders* decision is found in *Hamling v. United States*, 418 U.S. 87, 110 (1974); see also *Butler Brothers v. McColgan*, 315 U.S. 501, 510 (1942).

CONCLUSION

The decision below is simply a statement that an administrative agency is bound to follow its own regulations and the laws under which it was established. The principles upon which the Arkansas Supreme Court relied are clearly stated in the state statutes, state regulations and State Health Plans adopted as part of our health plan-

ning and medical care cost containment efforts. One time in seven years the AHPDA deviated from those principles, and the Arkansas Supreme Court has reversed in a decision which does not rely upon any grounds which would confer *certiorari* jurisdiction.

Respectfully submitted,

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